ABN-AMRO Bank Bhd v Ismail bin Mydinsah (trading as Ismy Classic)

HIGH COURT (PULAU PINANG) — CIVIL SUIT NO 22-497 OF 1997
KAMALANATHAN RATNAM J
23 SEPTEMBER 2004

Banking — Securities for advances — Loan — Credit facilities granted without securities — Whether credit-worthiness checked before facilities granted — Whether licensed bank allowed to grant facilities in absence of securities — Banking and Financial Institutions Act 1989 s 60(3)(c), 60(4)

Evidence — Adverse inference — Failure to call material witness — Whether s 114(g) of Evidence Act 1950 applies

The Plaintiff's claim was for a sum of RM319,192.72 together with interest and costs in respect of banking facilities granted to the defendant for which securities had not been perfected until after the writ of summons was served. No plausible reason was given to the Court by the Bank as to why it did not secure the two properties pledged to it. The defendant admitted that he had defaulted in the payment towards the facilities but raised in defence that a scam was perpetrated by the plaintiff's officer, one Mr Vega, who had the defendant's properties transferred to himself for a nominal purchase price which was below the market rate in exchange for him getting the facilities approved by the plaintiff. Mr Vega was not called by the plaintiff as a witness. The defendant also raised that by virtue of s 60(3)(c) of the Banking and Financial Institutions Act 1989 ('BAFIA'), the plaintiff should not grant facilities without securities.

Held, dismissing the plaintiff's claim with costs:

(1) The Bank owed a duty to dispel the allegations contained in the pleadings, by calling Vega. By not doing so this Court must invoke s 114(g) of the Evidence Act 1950 against the Plaintiff and hold that if the Plaintiff had called Vega, his evidence would have been unfavourable to the Plaintiff (see para 17).

(2) Where a Bank, which ought to have acted with due diligence and great prudence before releasing such a large sum as credit facilities, acted to the contrary, by not even ensuring that the person to whom it was lending a large sum of money was actually credit-worthy, then the principle that the 'loss lies where it falls' must apply (see para 23).

(3) By virtue of s 60(3)(c) of BAFIA, it is clear that a licensed Bank or a licensed merchant bank can grant a credit facility without security. If it chooses to demand security, then such security must comply with s 60(4) of BAFIA (see paras 28 and 31).

(4) In this case, the Bank did ask for security. However, there is no evidence, such as a valuation report, before the Court to show that the Bank had satisfied the provisions of s 60(4) of BAFIA (see para 32).

[**Bahasa Malaysia summary**

Tuntutan plaintif adalah untuk jumlah wang RM319,192.72 dengan faedah dan kos untuk kemudahan bank yang diberikan kepada defendan di mana cagaran untuknya tidak disempurnakan sehingga selepas writ saman disampaikan. Tiada alasan yang munasabah diberikan kepada mahkamah oleh bank mengenai kenapa ia gagal menyempurnakan cagaran ke atas dua hartanah yang dicagarkan kepada bank. Defendan mengakui bahawa beliau gagal membuat bayaran untuk kemudahan yang diberi tetapi telah bangkitkan di dalam pembelaannya penipuan yang dilakukan oleh pegawai plaintif yang bernama En Vega yang telah menukar milik hartanah kepunyaan defendan kepada dirinya untuk harga pembelian yang nominal yang kurang dari harga pasaran sebagai balasan bagi mendapat kelulusan dari plaintif untuk kemudahan bagi defendan. En Vega tidak dipanggil sebagai saksi oleh plaintif. Defendan juga bangkitkan bahawa kerana s 60(3)(c) Akta Bank dan Institusi Kewangan 1989 (BAFIA) plaintif tidak harus beri kemudahan tanpa cagaran.

Diputuskan, menolak tuntutan plaintif dengan kos:

(1) Bank tersebut mempunyai beban untuk menafikan tuduhan yang terdapat di dalam pliding dengan memanggil Vega. Dengan tidak berbuat demikian Mahkamah ini harus bangkitkan s 114(g) Akta Keterangan 1950 terhadap plaintif dan putuskan jika plaintif ada memanggil Vega, keterangannya sudah tentu tidak memihak kepada plaintif (lihat perenggan 17).

(2) Bila sesuatu bank yang sepatutnya bertindak dengan ketelitian dan kecermatan yang tinggi sebelum memberikan wang yang begitu banyak sebagai kemudahan kredit, telah bertindak secara bertentangan dengan tidak memastikan bahawa orang yang diberi pinjaman wang yang banyak adalah layak, prinsip 'kerugian adalah kepada pihak yang rugi' harus digunakan (lihat perenggan 23).

(3) Atas sebab s 60(3)(c) BAFIA, ia adalah jelas bank yang berlesen atau bank perdagangan yang berlesen boleh memberikan kemudahan kredit tanpa cagaran. Kalau ia memilih untuk tanya cagaran, cagaran tersebut harus ikut seksyen 60(4) BAFIA (lihat perenggan 28 dan 31).

(4) Dalam kes ini bank memang ada membuat permintaan untuk cagaran. Walau bagaimanapun, tiada bukti seperti laporan penilaian di hadapan Mahkamah untuk menunjukkan bank telah memuaskan peruntukkan s 60(4) BAFIA (lihat perenggan 32).]

Notes

For cases on loans, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 1938–1944

For cases on adverse inference for failure to call witness, see 7 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 116–129.

Cases referred to

Hong Leong Finance Berhad v Rextex Rubber Products (M) Sdn Bhd & Anor [1996] 4 CLJ 580 (refd)

Perwira Affin Bank Berhad v Orison Sdn Bhd & Two Ors [2004] 1 AMR 442 (refd)

Legislation referred to

Banking and Financial Institutions Act 1989 ss 2, 60(1), (2), (3)(c), (4)

Regina Daniel (Cheong Wai Meng & Van Buerle) for the plaintiff
Cecil Rajendra (Cecil Rajendra & Associates) for the defendant

Kamalanathan Ratnam J:

Case for the Plaintiff

[1] The Plaintiff's claim was for a sum of RM319,192.72 together with interest and costs in respect of banking facilities granted to the defendant made through various offers, and which offers were accepted by the defendant vide Letters of Offer dated 19 March 1996, 31 July 1996 and 8 November 1996. The Plaintiff reserved from time to time the right to vary any of the terms and conditions and the facilities were subject to periodic review that could be modified, restructured, converted, earmarked or cancelled by the Plaintiff at the Plaintiff's sole discretion and at any time without prior notice. The defendant admitted that he had utilised the overdraft facility up to the maximum limit and that he had actually utilised the sum of RM414,835.07 for the facilities and had made a repayment of RM93,642.35 towards the facilities. The defendant also admitted that he had defaulted in the payment towards the facilities. The defendant and his solicitors wrote letters to the Plaintiff requesting an extension of time to settle the outstanding loan due and owing to the Plaintiff. There was no complaint or protest by the defendant when the facilities were disbursed and utilised, as to the securities not having been perfected until after the Writ of Summons was served. The Notice of Demand dated 27 October 1997 was received by the defendant. It must be noted that the right of repayment is on demand. The defendant also did not pay the legal fees to enable the Plaintiff's solicitors to perfect the securities.

Case for the Defendant

[2] The defendant put his case simply. He testified that he had a business idea, namely to acquire a Master Franchise for sports apparel and products, which he presented to the Plaintiff s bank manager who thought that it was an excellent idea and told him to put in his application for credit facilities. His application was approved. He however defaulted in his repayment and the bank withdrew its facilities and sued for the amount utilised together with interest.

[3] However, in this case the defendant contended that the Bank Manager introduced him to a bank officer, one Vivega Balachandran @ Vega who agreed to process the loan. Vega then asked for a list of the defendant's assets out of which he accepted two items as security, namely the vista condo in Relau and a plot of land in Balik Pulau (Lot 139). The defendant duly surrendered the documents pertaining to these properties to Vega and a letter of offer offering the credit facilities up to RM500,000 was duly issued by the bank to the defendant.

[4] It is the defendant's case that even before the first letter of offer dated 19 March 1996 was processed, Vega, having picked out a three-quarter acre plot of land owned by the defendant in Kampung Perlis from the list of assets, told the defendant that if he sold him the said plot for a nominal sum, the latter would be able to process the defendant's application faster.

[5] Since he needed the credit facilities urgently the defendant agreed to sell the said land to Vega for a paltry sum of RM26,000. The letter of offer was then issued on 19 March 1996 and the defendant sold the said land to Vega on 12 April 1996.

[6] Even after this, the defendant's application for credit facilities had not been finalised. The defendant testified that he was now fully committed to his franchise business, having made the orders, rented premises, received stocks, and with a letter of credit having to be honoured, Vega then promised to expedite it if the defendant could further sell him the luxury condominium. The defendant agreed to do so and sold his Batu Ferringhi Luxury Condominium to Vega for RM180,000 which the defendant estimated to be less than half the market value at that time. The Sale and Purchase Agreement was tendered to the Court as an exhibit.

[7] The defendant pointed out that the money to purchase the defendant's condominium was loaned to Vega by the Plaintiff and he also pointed out that the same solicitors who processed the defendant's application for credit facilities from the bank, also handled Vega's bank loan. The said solicitors were the Plaintiff's solicitors.

[8] The defendant then pointed out that no sooner had the sale of the condominium been effected to Vega on 30 October 1996, the Bank through Vega, finalised the defendant's application for credit facilities on 8 November 1996, that is, within ten days of the date of the sale.

[9] The defendant then contended that less than six months later the bank pressed the defendant to sell his shares in various counters and to settle the credit facilities.

[10] According to the defendant, this time Vega himself prepared a letter on the defendant's letter head dated 12 July 1997 which reads as follows:

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12th June, 1997

The Manager , ABN AMRO Bank Bhd. ,
9, Beach Street,
10300 Penang.

Dear Sir,

Re : Ismy Classic
Overdraft & Trustreceipts facilities

I, Ismail bin Mydinsah, sole proprietor of Ismy Classic hereby irrevocably undertake as follows:

1) to sell my KUB and Dana Mutiara shares within two weeks after listing and apply the proceeds to settle all outstandings due to you , in any event by 30.9.97.

2) to make payments to the account as and when proceeds from the sale of sub franchise is received, in any event by 30.9.97.

3) to make payment to the account as and when funds from any other source is received, in any event by 30.9.97, latest.

4) to allow ABN bank to file a private caveat on the land which was supposed to have been charged to you but which could not be perfected due to the demise of the other half shareholder of the undivided property.

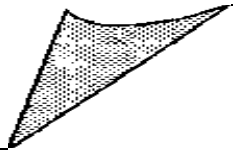
5) to sell my apartment at Relau valued at approximately RM136,000/- and use the proceeds to make payment to the account.

Yours sincerely,

(Sgd.)

(Ismail Bin Mydinsah)

SI 9, 2nd Floor, SP Plaza, Jalan Ibrahim, 08000 Sungai Petani, Kedah Darul Aman.



[11] In the meantime, the Plaintiff had not processed the papers to secure the two properties which the defendant had pledged to the bank and whose titles the defendant had surrendered to the bank, namely, the Vista Condo in Relau and Lot No 139 in Balik Pulau.

Findings of the Court

[12] No plausible reason has been given to the Court by the Bank as to why it did not secure the two properties pledged to it and thus failed to mitigate the losses suffered by the defendant. However the reasons given by the Plaintiff in evidence as to why it was not able to secure the two properties were that:

(a) the defendant had not furnished it with the quit rent and assessment receipts;

(b) the defendant did not pay the Plaintiff's solicitors' legal fees incurred by the Plaintiffs, and not fees which the defendant was supposed to pay the Plaintiff's solicitors for the completion of the legal documents.

[13] First and foremost, there was no evidence tendered by the Plaintiff that it even asked or wrote to the Plaintiff for the quit rent and assessment receipts and for their own legal fees to be paid. No letters demanding such documents were exhibited.

[14] The Plaintiff did not show either by documentary evidence or by calling anyone from the land office or any responsible person who would have testified that without the quit rent and assessment receipts, the Plaintiff would have been unable to process the charge documents. In any case the defendant contended that he had indeed handed over the quit rent and assessment receipts to the Plaintiff.

[15] As for the Plaintiff's own legal fees, in those days it was acceptable for the same solicitors to act both for the chargor and the chargee. However it is preposterous to suggest that just because their legal fees were not paid by the defendant, the Plaintiff was unable to process the charge documents. If the defendant had indeed agreed to this term, then the Plaintiff could have

sued for the unpaid fees. I find that the Plaintiff had acted unreasonably and had therefore failed to protect the defendant's interest in this case. A

[16] In the meantime the defendant had already made part payment of RM95,000. He had also sold, at the Plaintiff's request, his KUB shares and paid a further sum of RM14,700 to the Plaintiff. Notwithstanding these payments, the Plaintiff froze the facilities accorded to the defendant. B

[17] The defendant has raised the scam perpetrated by the Plaintiff's officer Vega in his defence. Yet the Plaintiff made no effort to call this Vega. The bank officer called as the Plaintiff's witness merely stated in evidence that he did not know where Vega was as he was no longer with the Bank. Surely the Plaintiff could have done more than that. If Vega had C disappeared, the Plaintiff must show what efforts it had made to secure the attendance of Vega. If he did not wish to attend, a subpoena ad testificandum ought to have been issued. PW1 did say that a writ of subpoena was issued but that the Bank was unable to serve it on him. No affidavit of non-service was filed and this Court is therefore unable to know D why service could not have been effected. The Bank officer testified that the Plaintiff had published a notice in 'The Star'. As to what that notice was all about, this Court was not told. It is clear that the Bank owed a duty to dispel the allegations contained in the pleadings by calling Vega. By not doing so, this Court must invoke s 114(g) of the Evidence Act 1950 against the Plaintiff and hold that if the Plaintiff had called Vega, his evidence would E have been unfavourable to the Plaintiff.

[18] Another interesting issue that this Court has to consider is the admission by PW1, the Bank Officer who testified on behalf of the Plaintiff. When asked what the real reason was for the defendant's credit facilities to have been stopped he said 'the real reason the Bank withdraw the combined F limit facility was because the defendant had defaulted three trust receipts with no payment received from the defendant on the due dates'. He however admitted that the said three trust receipts were not produced in Court and no notice was given to the defendant to this effect.

[19] It is clear, therefore, that the termination of the credit facilities G extended to the Plaintiff was because of his failure to repay on three trust receipts. But those vital exhibits have not been exhibited. This Court is therefore left to wonder which of the credit facilities as pleaded in the statement of claim, the defendant had actually failed to repay.

[20] When asked under cross-examination the nature of the claims made H by the Plaintiff against him, the defendant testified that the claim was for a combined facility of overdraft, Letter of Credit and Trust Receipts. It was most surprising to note that Counsel for the Plaintiff had put to the defendant that the claim was only in respect of the overdraft facilities. If this was so then why did the Bank terminate the credit facilities on the basis that I the Plaintiff had defaulted in the repayment of the trust receipts.

[21] The Plaintiff clearly is unsure of the basis of its own claim.

[22] When the Plaintiff's bank officer was asked whether the Bank was satisfied with the defendant's credit-worthiness before it approved the credit facilities, he answered in the affirmative. When the Court asked the witness to point out to any available documents in the agreed bundle of documents that would show that the Plaintiff was satisfied as to the business viability of the defendant, the witness candidly conceded that there was none.

[23] I am therefore compelled to hold that where a Bank, which ought to have acted with due diligence and great prudence before releasing such a large sum as credit facilities, acted to the contrary, by not even ensuring that the person to whom it was lending a large sum of money was actually credit-worthy, then the principle that the 'loss lies where it falls' must apply. This coupled with the lackadaisical manner in which the termination was effected, in that the trust receipts towards which no payment was made, were not even detailed in the pleadings nor were the said receipts enclosed in the Agreed Bundle of Documents, would tend to show a total disregard of proper banking management by the Plaintiff.

[24] In any event, if the claim by the Bank was only in respect of the overdraft facilities then based on the admission of the defendant that he had utilised the maximum sum of RM250,000, this would mean that the Plaintiff ought to have confined its claim only to this amount. But when cross-examining the defendant, Counsel for the Plaintiff referred the defendant to exhibit P1 which is the Bank's Statement of Accounts which showed that the total sum utilised was RM414,835.07. Counsel for the Plaintiff then suggested that this amount represented the overdraft facility provided. The defendant vehemently denied this contending that the said sum of RM414,835.07 was in respect of the combined facilities. If the limit of the overdraft facility was only RM250,000, how did the Plaintiff allow the defendant to use up to RM414,835.07 and still contend this sum represented the overdraft facility. Something is amiss. In fact P1 actually showed the amount as RM521,723.58 which included the interest.

[25] With all these imperfections manifest in the Plaintiff s case there is no way that this Court could find for the Plaintiff.

[26] One of the issues raised by the defence was that there was a breach of s 60 of the Banking and Financial Institutions Act 1989 by the Bank. For the purposes of considering the impact of this section on this case together with the previously decided authorities, it is necessary to reproduce the entire s 60 of the said Act which reads as follows:

> 60. Grant of secured and unsecured credit facilities.
>
> (1) Subject to an order made by the Bank under subsection (2), no licensed institution shall give to any person any credit facility without security.
>
> (2) The Bank may by order published in the Gazette permit any particular licensed institution, or any class, category or description of licensed institutions, to give to any person any credit facility without security which, together with any other credit facility without security earlier given to him, does not exceed an aggregate amount set out in the order.

(3) Subsection (1) shall not apply to any credit facility given - A

(a) to another licensed institution;

(b) to any other person engaged in the provision of finance who is approved in writing by the Bank; or

(c) by any licensed bank or licensed merchant bank, except were the credit facility is given by such bank or merchant bank to its related corporation. B

(4) A security in respect of a credit facility given to any person by a licensed institution shall consist of property of a value which is not less than the amount of the credit facility given to such person.

[27] The defendant thus relied upon the case of *Hong Leong Finance Berhad v Rextex Rubber Products (M) Sdn Bhd & Anor* [1996] 4 CLJ 580. In C that case the Court held that a finance company could not lend money or give any credit facility without security unless so ordered by the Central Bank of Malaysia by publication in the Gazette. The defendant thus relied on s 60(2) of the Act. Mr Rajendra also relied on another decision of the High Court, namely *Perwira Affin Bank Berhad v Orison Sdn Bhd & two ors* D [2004] 1 AMR 442. This was an appeal against a summary judgment and one of the triable issues raised was that by granting loans on illusory security, the Plaintiff's action ran counter to s 60(1) and (4) of the Act thereby prejudicing the defendant, which would also entitle the relevant authorities to revoke the Plaintiff's banking licence. It was alleged that the Plaintiff s claim was illegal or tainted with illegality and thus contrary to E public policy. The Learned Judge accepted this argument and set aside the summary judgment and sent the case back for full trial.

[28] When Counsel for the defendant raised s 60(1) as a defence, Cik Regina referred the Court to s 60(3)(c). It is clear therefore, that a licensed Bank or a licensed merchant bank can grant a credit facility without F security. In the circumstances therefore, since the Court in *Rextex Rubber Products* (supra) did not consider the implication of s 60(3)(c), I decline to follow it's ruling.

[29] I find that in this case the Plaintiff being a licenced bank is covered by s 60(3)(c) and that therefore s 60(1) would not apply to it. G

[30] It is also worthy to note that s 60(1) refers to 'any person' and person as defined in s 2 of the Act includes an individual. Therefore pursuant to s 60(1) read together with subsection (3), a licenced Bank can give a credit facility without security. If that be so, then what is the import of subsection (4) which demands that the security in respect of a credit facility H given to any person by a licenced institution shall consist of property of a value which is not less than the amount of the credit facility given to such person.

[31] I take this to mean that, whilst the Bank is entitled to grant credit facilities without security, if it chooses to demand security then such security must comply with subsection (4) . I

[32] In this case the Bank did ask for security in the form of (a) a Condo in Relau and (b) a plot of land in Balik Pulau (Lot 139). However there is

no valuation report exhibited in the Common Agreed Bundle of Documents to show that the Bank had at least attempted to comply with subsection (4). Clearly therefore, there is no evidence before the Court that the Bank had satisfied the provision of subsection (4) of the Act. On this score too I find for the defendant.

[33] Considering all the circumstances I am constrained to dismiss this suit with costs.

Plaintiff's claim dismissed with costs.

Reported by AG Kalidas